

Criminal Law Committee

Response to question papers

Parole: Question Papers 1-3

1 November 2013

NSW Law Reform Commission

GPO Box 5199
SYDNEY NSW 2001
AUSTRALIA
nsw_lrc@agd.nsw.gov.au

Contact:

Greg Johnson

President, NSW Young Lawyers

Alexander Edwards

*Chair, NSW Young Lawyers Criminal Law
Committee*

Reviewers:

Thomas Barbat

Contributors:

Caitlin Akthar, Aurhett Barrie, Vanessa Chan,
James Chin, Matt Clarke, Rhonda Furner, Sam
Hartridge, Jie Hu, Sharyn Jenkins, Sarah Khan,
Catherine Kirkpatrick, Nicole Mazurek,
Suzanne Mortimer, Lucia Pante, Rhonda
Pietrini, Claire Stimpson, Andrew Tiedt,
Matthew Ward and Greg Young

NSW Young Lawyers
Criminal Law Committee
170 Phillip Street
Sydney NSW 2000

ylgeneral@lawsociety.com.au
www.younglawyers.com.au

Introduction

The NSW Young Lawyers Criminal Law Committee ("the Committee") refers to the terms of reference given to the NSW Law Reform Commission ("the Commission") on 1 March 2013 on improving the system of parole in NSW. The Committee has structured its submission by reference to the Commission's Question Papers 1, 2 and 3.

NSW Young Lawyers, a division of the Law Society of NSW, is made up of legal practitioners and law students, who are under the age of 36 or in their first five years of practice. Our membership is made up of some 13,000 persons.

The Committee provides education to the legal profession and wider community on current and future developments in the criminal law, and identifies and submits on issues in need of law reform.

Table of Contents

Question Paper 1	4
Question Paper 2	7
Question Paper 3	9

Question Paper 1 – The design and objectives of the parole system

Question 1.1: Retention and objectives of parole

1. Should parole be retained?

Yes.

2. If retained, what should be the objectives of the parole system in NSW?

The objectives of the parole system in NSW can be divided into two categories. The first applies while an offender is in custody; the second when an offender is released into the community on parole.

While in custody, parole should provide prisoners with an incentive:

- to be of good behaviour;
- to comply with directions of Corrective Services;
- to participate in prison treatment programs; and
- to participate in education and work training programs.

When released into the community on parole, the overarching purpose of parole should be to assist in the rehabilitation of offenders by guiding and facilitating their reintegration into the community.

- To this end the Committee endorses the four principles set out on p.5 of Question Paper 1.

3. Should there be an explicit statement of the objectives or purposes of parole in the *Crimes (Administration of Sentences) Act 1999 (NSW)*?

Yes.

The statement should appear in a similar form to that in s 3A of the *Crimes (Sentencing Procedure) Act 1999* (the “Sentencing Act”). The objectives or purposes should reflect those stated above at 1.1.2.

Question 1.2: Design of the parole system

1. Should NSW have automatic parole, discretionary parole, or a mixed system?

The present mixed system should be retained.

The Committee is not opposed to the NSW Law Reform Commission’s (‘the Commission’) suggestion that “automatic” parole be reframed to refer to release at the expiry of the non-parole period unless SPA orders otherwise.

2. If a mixed system, how should offenders be allocated to either automatic or discretionary parole?

See the Committee’s response to 1.2.1.

The Committee is of the view that head sentences of 3 years or less is an appropriate cut off point for automatic parole and should be retained.

3. Does there need to be a mechanism to ensure supervised reintegration support for offenders serving short sentences? What should such a mechanism be?

No.

The Committee submits that sentences of imprisonment for 6 months or less are not serious enough, in the current funding environment, to warrant burdening Community Corrections with supervised reintegration support. Often, such sentences are imposed by sentencing courts as a “short, sharp stint in custody” to give an offender insight into what a lengthier period of incarceration might be like. An example might be a recidivist traffic offender with an otherwise clean record who has received escalating penalties resulting in eventual imprisonment.

Question 1.3: Difficulties for accumulated and aggregate sentences

What changes should be made to legislation for aggregate and accumulated approaches to sentencing to ensure consistent outcomes for parole?

The Committee does not suggest any changes to the current legislative approaches insofar as parole is concerned.

Question 1.4: SPA’s power to take over decision making responsibility

1. What safeguards should there be on automatic parole?

SPA already has the power to impose special conditions on parole (s 128(1)(b) *Crimes (Administration of Sentences) Act 1999* (“CAS Act”)), which can be used to alleviate any specific concerns held about risks posed by certain prisoners. The Committee agrees with the view expressed by other stakeholders that the power to revoke court-ordered parole ought be used only in exceptional circumstances.

2. Should there be any changes to SPA’s power to take over parole decision making for offenders with court based parole orders?

Yes.

The Committee shares Legal Aid’s concern that s 51(1AA) of the Sentencing Act is sometimes responsible for SPA’s practice of revoking court-imposed parole before release if an offender is unable to nominate a place of residence in NSW. Given the adverse consequences this can have upon a person who has been rendered homeless (even if they had a fixed place of residence prior being incarcerated), the Committee submits that courts ought be given the power to review court-imposed conditions if SPA wishes to revoke them. The Committee proposes that, if SPA opposes a court-imposed parole order, there should be a notice period in which SPA is required to provide submissions to the sentencing court. This would give the parties the opportunity to address any relevant concerns and make submissions. The sentencing court could then determine whether to revoke or re-instate the original court-imposed parole order, with a binding effect upon SPA.

Additionally, the Committee endorses the proposal in Question Paper 1 that Corrective Services should be required to assess an offender’s access to accommodation and begin making plans for accommodation at an early stage of the offender’s sentence.

Question 1.5: Supervised conditions on parole based orders

Should there be any changes to the way supervision conditions are imposed on a court based parole order?

Yes.

Supervision ought be presumed and only deleted if the sentencing court expressly orders otherwise at the time of sentence.

The Committee submits that a court order for there to be no supervision might be subject to a legislative safeguard, which would allow SPA to review the court's decision if they are concerned about releasing an offender into the community unsupervised for a particular reason/s. The rationale here is that a court is not in a position to make an assessment as to how a person behaves in or responds to custody at the time of sentence and cannot be certain whether they would benefit from supervision when released. Corrective Services and SPA are, of course, in the best position to make this assessment.

Question Paper 2 – Membership of the State Parole Authority and Serious Offenders Review Council

Question 2.1: Membership of SPA

1. Does the balance of members on SPA or SPA's divisions need to be changed in any way?

Yes.

The Committee suggests that a return to seven members per division, with four of those members being community members, would satisfy a number of the perceived issues with SPA identified in Question Paper 2.

The only caveat the Committee places over this proposal is whether SPA would be allocated the required resources to restore the previous position.

2. How can the selection and performance of SPA's community members be improved?

Further transparency in the selection of community members is desired, involving a formal selection process and a set of standardised selection criteria that all applicants must meet. All members, not just community members, should be subject to a performance review system to maintain high standards of performance. Furthermore, there should be a mandatory requirement for SPA community members to undertake professional development courses each year.

If the number of community members is returned to seven per division, a proportion of community members could be appointed for their specific expertise and a proportion could be representative of the community generally (say, 2 members of each per division). This would facilitate the utilisation of the expertise of certain community members, while at the same time representing broader community sentiment.

Consideration should also be given to the social and cultural backgrounds of persons coming before SPA, and the Committee submits that the over-representation of indigenous persons should be a consideration when selecting members. We do not necessarily submit that indigenous representation ought to be increased as a mandatory measure, but recognise that some members of indigenous communities might be in a particularly advantageous position to represent the interests of communities in which rates of indigenous offending are high.

3. Should SPA's community members be representing the community at large or be representing specific areas of expertise?

Both.

Although selecting community members with specialised expertise is highly desirable, at least a proportion of community members should be selected purely as representatives of the community at large. This would serve to allay any perceptions of potential conflicts of interest and/or bias of members and reassure the community as a whole that its interests are being represented.

Question 2.2: Membership of SORC

1. How can the selection and performance of SORC's community members be improved?

See our answer to 2.1.2.

The Committee submits that the same considerations relevant to the selection and performance of SPA's community members should apply to SORC's community members.

2. Should SORC's community members be representing the community at large or be representing specific areas of expertise?

Both.

See our answer to 2.1.3.

Question Paper 3 – Discretionary parole decision making

Question 3.1: The public interest test

Should the current public interest test in s 135(1) of the CAS Act be retained, or does the Queensland test, or something similar, better capture the key focus of the parole decision?

The current test should be retained.

The Committee submits that the broad drafting of s 135(1) of the CAS Act gives SPA a wide range of discretion when determining whether it is in the public interest to release an offender to parole. This is desirable given the variety of cases that must be considered by SPA and the importance of there being an overarching “public interest test”. The list provided by s 135(2) is helpful and wide ranging, although not exhaustive, and SPA’s *Operating Guidelines* (“OGs”) provide extensive assistance as to how the statutory criteria are to be applied. Noting that SPA’s OGs recognise the importance of the Queensland focus on the concept of “risk”, the Committee takes the view that the key focus of parole decisions is not always identical and that therefore the flexibility provided under s 135(1) should be retained.

Question 3.2: The matters that SPA must consider

Should any matters for consideration be added to or removed from the lists in s 135(2) and s 135A of the CAS Act?

Yes.

Matters for consideration under s 135(2)

As indicated in our response to 3.1, the non-exhaustive list of mandatory factors to be considered by SPA, prescribed under s 135(2), is generally useful and ought be retained.

However, the Committee queries the criterion at s 135(2)(c) regarding “the nature and circumstances of the offence to which the offender’s sentence relates”, and raises the question of whether this serves to diminish the role of the sentencing court when fixing a non-parole period. By the same token, the Committee notes the relevance of SPA being apprised of the facts of the offending so as determine an offender’s suitability. These are ascertainable through the relevant remarks of the sentencing judge, which are prescribed to be had regard to at s 135(2)(d), rendering s 135(2)(c) somewhat superfluous. The Committee suggests simply removing s 135(c) as the nature and circumstances of the offending must only be viewed through the lens of the sentencing court’s findings.

The Committee also queries the speculative nature of s 135(2)(f) and submits that an offender’s ability to adapt to normal lawful community life ought be presumed unless there are good reasons to suggest otherwise.

The Committee further submits that an additional matter be included in s 135(2) regarding an offender’s behaviour during any previous period of parole, period of leave or community-based sentence, subject to the following limitation:

- that regard only be had to breaches of conditions during any previous period of parole, period of leave or community-based sentence that are found by a court or SPA (i.e. precluding reports where there is “reason to suspect” an offender has breached their parole but nothing results from the inquiry).¹

So, if such breaches are incorporated into s 135(2), SPA should be required to have regard to:

¹ *Crimes (Administration of Sentences) Act 1999* (NSW) s 169(1).

- the nature and circumstances surrounding the breach;
- the number of breaches and the period/s of time between breaches;
- whether any formal action was taken on the breach;
- whether any further or varied conditions were imposed and whether they were complied with;
- how far the offender was into the period of parole, period of leave or community-based sentence at the time of the breach; and
- the age of the offender at the time of the breach.

Matters for consideration under s 135A

The Committee submits that ss 135A(a) and 135A(h) be deleted as they are speculative in nature. Whether an offender is likely to be able to adapt to normal lawful community life or likely to comply with any parole conditions might be gleaned from the other criteria in s 135A, but prescribing it as a criterion is asking the author of the report to reach a conclusion. For this same reason, s 135A(b) should be amended to read, “the measures to be taken to reduce the risk of the offender re-offending while on release on parole”.

The Committee submits that the following criteria be inserted into s 135A:

- whether the offender has access to support or services likely to reduce the risk to the community;
- whether there are any other circumstances likely to increase the risk;²
- that reference be had to assessments and recommendations of clinicians;³ and
- the offender’s attitude towards breaches of conditions imposed during previous periods of parole, period of leave or community-based sentences as reflected in relevant reports.

Question 3.3: Specific issues given weight by SPA

1. Should any changes be made to the way SPA takes completion of in-custody programs into account when making the parole decision?

Yes.

The present system of generally refusing parole where programs have not been completed might be seen to prioritise the completion of programs at the expense of other relevant considerations. SPA ought not be permitted to refuse parole solely on the grounds that an offender has not completed relevant programs. This is especially so when a particular program/s was not made available to the offender or for some other reason the offender was unable to complete it. In such cases, SPA ought grant parole where an offender would otherwise be considered suitable for release. Examples of reasons beyond an offender’s control are noted in the Question Paper at 3.28–3.31.

The concern raised in the Question Paper at 3.31 about the efficacy of programs offenders are required to complete is valid. For example, the Department of Corrective Services’ *Compendium of Correctional Programs in New South Wales* lists the CUBIT program (which sex offenders are required to complete) as accredited at Level 1, the highest level listed within the compendium, signalling that at least one study has been done into its effectiveness. However, the CUBIT Deniers Program is described as a “Level 4 Registered Program”, the lowest level, which indicates that

² NSWLRC, Question Paper 3, Annexure A: Factors considered by the parole decision maker in other jurisdictions, 47 (Queensland).

³ Ibid (Victoria).

the program has not yet been submitted for accreditation and no such study has been undertaken regarding its effectiveness.

The decision-making process whereby an offender is assessed as being required to complete programs is another issue of concern. The Committee provides the following example:

An offender was serving a sentence for a sex offence where it was held that there was no link between any drug use by the offender and the commission of the offence. The offender was advised that he should complete the Intensive Drug and Alcohol Treatment Program ('IDAPT') and that he would likely be refused parole if it were not completed. However, the IDAPT Program is a Level 4 program.

In such circumstances, the Committee submits that the refusal of parole solely on the basis that such an offender has not completed the IDAPT program is not appropriate. An offender's refusal to participate might indicate the offender's attitude towards his/her offending and his/her desire to be rehabilitated, but it must not be taken further than that and rendered an ipso facto ground for denial of parole.

In cases where offenders' attempts to complete programs have been thwarted, an offender must not be denied release for reasons entirely beyond his or her control. The Committee submit that, in the majority of cases, the community is better served by rehabilitating offenders through supervised parole rather than them remaining in custody with no relevant rehabilitative programs being available. Indeed it is easier and more cost effective to provide programs outside of custody.

The Committee submits that stipulating the completion of relevant programs as a condition of parole (rather than a ground for refusal) would help ensure fairness to offenders who have been deprived of access to relevant programs in custody.

2. Should any changes be made to the way SPA takes security classification into account when making the parole decision? If so, how?

Yes.

Whilst it is appropriate to take an inmate's security classification into account when making parole decisions, it is not the case that failure to achieve a minimum-security classification indicates that an inmate poses a risk to the community. Assuming the current system of classifications remains in force, the only change the Committee suggests is that SPA members should be required to have a thorough understating of why an inmate might not have achieved a minimum security classification. See our response at 3.3.4.

Further, the Committee shares the interest expressed by Corrective Services in streamlining the current classification system. Removing unnecessary barriers to an inmate being able to achieve minimum security classification, access leave and demonstrate preparedness for parole is an important means through which to help offenders effectively move towards becoming reintegrated into the community.

3. Should any changes be made to the way SPA takes homelessness or lack of suitable accommodation into account when making the parole decision? If so, how?

Yes.

The Committee is of the view that SPA should only take homelessness or lack of suitable accommodation into consideration where there is a further identifiable basis that releasing the offender would place the community at risk. It should not be a bar to release of itself. Not granting parole to such offenders only delays their inevitable release and deprives them of the opportunity to adjust to life outside custody, potentially exposing the community to greater risk.

The Committee notes the proposition that offenders without stable accommodation present a greater risk to the public if released on parole than those with stable

accommodation. If this proposition is to be relied upon, the Committee submits that it ought to be tested through an empirical study.

One group of offenders for whom the accommodation requirement is often problematic are offenders from other States. For such offenders, the concern is often not whether they have stable accommodation, but whether they can be effectively supervised during their parole period. Interstate parolees would, as a general rule, be more likely to successfully serve their parole period with the support of their family and community in their home State rather than, for example, being required to live in a halfway house with other parolees in NSW.

This can be illustrated by another example:

An offender was incarcerated for an offence that was committed more than twenty years earlier. In the intervening years, the offender was homeless and suffered from mental illness but did not commit any criminal offences. The offender was refused parole on the basis of his/her lack of suitable accommodation.

The Committee is of the view that the offender's behaviour during this twenty-year period is highly relevant and ought to have demonstrated to SPA the offender's ability to adjust to "normal lawful community life" regardless of his/her having suitable accommodation. The Committee submits that a requirement to report to a particular office of Community Corrections and maintain contact with their parole officer would have been sufficient in these circumstances.

Additionally, Housing NSW and Community Corrections should be better resourced to supply and identify suitable release accommodation. Despite the potential upfront costs, it is likely that the costs of housing offenders in halfway houses would be significantly more cost effective in the long term than keeping offenders in custody. The Committee notes the recent Government decision to close one of two halfway houses for high-risk sex offenders and submits that this is a step in the wrong direction.

4. Are there any issues with the way that SPA makes decisions about risk?

Yes.

In view of the conflicting arguments in the academic literature, the Committee expresses concern about the consideration of risk in SPA's decision-making process insofar as the compounding effect that identified risk factors can have in the overall assessment.

An offender's LSI-R score is used to determine their security classification. An offender's LSI-R score is also used to determine their eligibility to complete programs. A failure to complete programs because of security classification, or LSI-R score, can be a reason for failure to progress to a lower security classification. This means that when an offender applies for parole, it is possible that SPA is at times presented with an overstated level of risk, combined with a failure to progress to a lower security level and failure to complete programs, leading to a decision to refuse parole. Because of this, SPA ought to be better informed about the potential for this to occur and take this into account in the parole decision-making process. While the LSI-R is a useful tool for assessing risk and can help overcome potential problems pertaining to the partiality of decision-makers, the Committee is of the view that the illusion of certainty must be avoided when it comes to risk assessments.

Question 3.4: Deportation and SPA's parole decision making

Does there need to be any change to the way SPA takes likely deportation into account when making the parole decision?

Yes.

Point (j) of the SPA OG should be excluded as a factor in parole decision-making

If deportation is a certainty (as established by evidence or a prosecution concession), the sentencing court may take it into account as a relevant consideration.⁴ However, the sentencing judge or magistrate is unable to consider how the personal or family circumstances of the offender may change over time. Circumstances in an offender's country of origin may change. Thus, consideration of the impact of deportation ought not be precluded simply because it was taken into account on sentence.

SPA should supplement its inquiry with information regarding the prisoner's opportunity to access rehabilitation programs when taking into account point (b) of the SPA OG

Whether a potential deportee offender has been provided with an opportunity to access a rehabilitation program is a highly relevant issue given that if an offender has not been given such an opportunity, point (b) will weight unfairly against them.⁵ If an offender is found ineligible to participate in rehabilitation programs whilst in custody due to their low risk of recidivism, language difficulties and/or medical issues, this needs to be factored into SPA's decision-making process and therefore should be incorporated in the SPA OG.

Question 3.5: SPA's caseload and resources

Do any changes need to be made to SPA's administrative practices, workload or resources?

Yes.

SPA's heavy caseload places limitations on members' ability to meaningfully assess and discuss all matters relevant to parole decisions. Without having analysed this issue in great detail, it is difficult to know whether reforming SPA's administrative practices would make any difference but the Committee is in favour of streamlining and cost saving where appropriate.

If the present mixed system is to be retained, the Committee submits that SPA ought continue to automatically consider all offenders' release on parole.

In any event, the Committee submits that all necessary resources be devoted to SPA so as to fairly and properly achieve just outcomes for offenders and the community alike.

Question 3.6: Planning for parole and assistance with parole readiness

What changes (if any) are needed to improve parole planning and ensure that suitable offenders can demonstrate their readiness for parole?

The Committee submits that an initial case plan and/or early review must stipulate a list of the activities that will later be relevant to a determination of an offender's parole suitability. To this end the Committee supports the suggestion in the Question Paper that a Community Corrections officer be formally involved in an early parole readiness planning process to inform an offender of what will be expected of them whilst in custody if they are to be released on parole. The Committee also supports the remainder of suggestions at paragraph 3.65.

⁴ *R v Kwon* [2004] NSWCCA 456.

⁵ Larissa Behrendt, 'Immigration Deportees and Parole: Some Issues' (Paper presented to the Australian Conference on Parole Boards and Parole Authorities, New South Wales, 11 May 2006), cited in Michael Grewcock, 'Punishment, Deportation and Parole: The Detention and Removal of Foreign Prisoners Under Section 501 *Migration Act 1958*' (2011) 44(1) *Australian and New Zealand Journal of Criminology* 56, 62; see also New South Wales Corrective Services, *Offender Assessment* - <<http://www.correctiveservices.nsw.gov.au/offender-management/offender-services-and-programs/offender-assessment-unit>>: offender assessments are used to determine which offender to target for an intervention.

Of further concern is the need for parole planning to give sufficient attention to offenders who may be unable to achieve a sufficiently low security classification or who are otherwise unable to participate in programs, activities and treatments (see the Committee's response to 3.1.1). Of note are offenders with a cognitive, physical or mental disability, offenders who identify as Aboriginal or Torres Strait Islanders and offenders in protective custody. Although some regard is had to the circumstances of such offenders in the SPA OG, it is preferable that disadvantage suffered by these offenders be addressed in planning for parole rather than when considering whether to grant it. An adjustment at the decision stage is necessarily artificial. However, planning that takes account of such disadvantage/s would allow for the provision of an alternative means through which to address the expectations of SPA.

Question 3.7: Victim involvement and input into SPA decisions

1. Should victims' involvement in SPA decisions be changed or enhanced in any way?

No.

The Committee does not believe that victims' involvement in SPA's decisions should be altered. SPA should continue to receive written and oral submissions from victims, subject, however, to the limitations proposed at 3.7.2.

2. Does the role, purpose or recommended content of victim submissions to SPA need to be changed or clarified?

Yes.

There is currently a large degree of confusion regarding the purpose of victim submissions. Clarification is needed to ensure that victims understand what information to include in their submissions and the way that their submissions will be used. The lack of guidance in this area is only likely to produce false expectations and a sense of frustration from victims, who may feel that due weight has not been given to their statements.

In particular, the Committee believes that use of the content of victim submissions should be limited to matters that could reasonably assist SPA in determining the risks of granting parole and any conditions that should be placed on the offender's release. While this may appear restrictive, it might be the most appropriate way to balance the interests of victims and their families with those of efficiency, relevance and fairness to the offender. For instance, victim submissions should not be used as a means of revisiting matters already considered on sentence. This includes factors such as the nature of the offence, its impact on the victim and the need to provide adequate punishment.

As noted by the former New South Wales Parole Board, "[t]he victim statement to the Parole Board should not be seen as a further opportunity by the victim or victim's family to influence or change the sentencing process or the determination of the sentencing court."⁶ Rather, victim submissions should focus on issues that go directly to questions regarding the suitability of the offender for release. This may include evidence of ongoing threats or intimidation whilst in custody, apprehended unwanted contact or violence, as well as any geographic limitations that may be necessary to impose upon release. Limiting the use of victim submissions in this way is consistent with the aims and purposes of parole and will ensure that victims are not misled as to the potential impact their submission may have on a decision.

⁶ New South Wales Parole Board, Submission to NSW Ombudsman, Review of the Crimes (Administration of Sentences) Amendment Act 2002 and Summary Offences Amendment (Places of Detention) Act 2002, December 2005 at 149.

Question 3.8: Role of the Serious Offenders Review Council

1. Should the separate parole decision making process for serious offenders be retained?

Yes.

2. If yes, do any changes need to be made to the role played by the Serious Offenders Review Council in parole decisions for serious offenders?

For serious offenders, the separate parole decision-making process should be retained. It is true that the involvement of the SORC results in some duplication of matters that are considered in respect of serious offenders. However, the SORC's involvement in the parole decision-making process is important because it has special knowledge of serious offenders. This is highly relevant information that would not necessarily be available to SPA without the advice of the SORC.

The Committee is of the view that no changes need to be made to the role of the SORC in this context. However, the Committee is of the view that reports by Community Corrections on offenders should be made available to SORC as a matter of course.

Question 3.9: A different test for serious offenders

Should SPA apply a different test when making the parole decision for serious offenders? If yes, what should it be?

No.

While alternative tests might appear to provide greater emphasis on community safety when considering an offender's release, the reality is that the protection of the community is already the highest priority in the SPA OG⁷ and is a paramount concern of the SORC when preparing their advisory report.⁸ The decision making process is complex enough without adding different tests for different categories of offenders.

Question 3.10: Security classification and leave for serious offenders

Are there any changes that can be made to improve the interaction between security classification, access to external leave and the parole decision for serious offenders?

Yes.

External leave not to be determinative – SPA to consider reasons for it not being granted

The Committee recommends amendment of point 2.3(g) of the SPA OG to read as follows:

[While there will be exceptions, in principle an inmate should achieve the following before being granted parole]

(g) in the case of Serious offenders and other long term inmates, ~~participation in external leave programs and~~ a recommendation for release by the Review Council.

⁷ State Parole Authority, *Operating Guidelines* (2012) [1.1].

⁸ *Crimes (Administration of Sentences) Act 1999* (NSW) s 198(3).

A paragraph with the following words (or similar) could then be inserted below point 2.3(g):

The successful completion of external leave programs is often the best way to demonstrate that a serious offender has a “realistic prospect” of complying with parole (as considered under 2.3(e) of the Guidelines). However, it is not the only means by which parole readiness can be demonstrated and the fact that a serious offender has not had external leave experience does not of itself mean that parole cannot be granted.

Where a serious offender has failed to participate in external leave programs, SPA should obtain from the SORC and the Commissioner the reasons for this and consider whether the offender’s not being granted extended leave was beyond his/her control. This should be taken into account by SPA, along with all other relevant facts and circumstances, in deciding whether or not it is appropriate to grant parole.

The proposed amendment to the SPA OG would seek to serve at least two purposes:

- avoid the situation where SPA feels “constrained” to refuse parole because the particular offender has no leave experience;
- address the issue that factors beyond an offender’s control may inhibit a serious offender’s ability to participate in rehabilitation programs and prevent a serious offender from obtaining a low security classification and accessing external leave.⁹

Amend the security classification regime to make lower security classifications enabling leave access more attainable

The Committee takes into account observations made by Williams JA in *Butler v Queensland Community Corrections Board* [2001] QCA 323; (2001) 123 A Crim R 246 at [6]-[7] regarding the need for an offender to have sufficient time between sentence and the parole eligibility date to practicably reach the necessary security classification for parole to be granted. These considerations are equally relevant in this State and the Committee makes the following proposals with the aim of providing serious offenders with greater opportunities and incentives to reach lower security classifications:

- “streamlining” security classifications: the Committee recommends that the current regime of security classifications be simplified and consist of three classifications – maximum, medium and minimum; an inmate’s security classification be reviewed every 6 months (opposed to at least every 12 months¹⁰). The Committee notes that this would likely increase the Commissioner’s administrative burden and suggest that the requirement that a review be conducted every 6 months could be applied to all offenders eligible for parole in 3 years or less;
- a formal plan be put in place for the Commissioner to prepare offenders for parole at security classification reviews and explore other avenues to enhance an offender’s parole readiness in the absence of leave experience;
- that the Commissioner’s discretion to disregard SORC’s recommendations about serious offenders’ security classifications and refuse leave be limited.

Question 3.11: Role of the Serious Offenders Review Council

Do any changes need to be made to the powers of the Commissioner and the State to make submissions about parole?

No.

⁹ See point 2.6 of the SPA OG (June 2012) and p.3 of the Committee’s Submission in response to the Scoping Paper (23 August 2013).

¹⁰ As currently required under reg 21A of *Crimes (Administration of Sentences) Regulations 2008* (NSW).

It is the Committee's view that the power of the Commissioner to intervene under s 160 is entirely appropriate and should be retained. Regarding the power under ss 140A and 153, it is the Committee's position that no changes are warranted. Any concerns over potential political interference are counterbalanced by the arguable public interest in its retention and its relatively infrequent use. Accordingly, the power should neither be expanded nor restricted. Additionally, it is recommended that SPA include in its Annual Report the general nature of the cases in which this power is exercised in order to improve accountability.

The Committee does hold some concern with the power possessed by the Commissioner (s 141A) and the State (s 153) to make submissions that SPA must have regard to but ultimately may choose not to follow. The power to make ad hoc interventions leaves the process open to political interference. But the powers are exercised so infrequently that it must be assumed that they are being used with an appropriate degree of circumspection. However, the Committee does suggest, in the interests of transparency, that SPA provide qualitative (anonymised if necessary) information about the cases in which State authorities or the Commission have intervened in its Annual Report.

Question 3.12: Parole and the HRO Act

What changes, if any, should be made to improve the interaction between parole decision making and the provisions of the *Crimes (High Risk Offenders) Act 2006 (NSW)*?

The Committee is of the view that two changes should be made to improve the interaction between parole decision making and the *Crimes (High Risk Offenders) Act 2006* ('the HRO Act'). These two changes are:

- changing the time frame in which applications can be made under the HRO Act; and
- introducing notification requirements.

The period of time in which an application by the State under the HRO Act can be made should be lengthened to 12 months, as the current six-month time frame¹¹ is too restrictive. This is because it can result in SPA making decisions affecting an offender's release or supervision with no information as to whether an application will be made. An extension of the time frame for an application, in combination with the notification requirements below, would aim to ensure that SPA are made aware of any applications under the HRO Act as early as possible.

Amending the time frame in this way could also assist in avoiding situations where prisoners are released from custody or their supervision terminated and then further detained or supervised due to an application. Whilst this may not be a regular occurrence due to the interim orders available under the HRO Act,¹² it is still a possibility. The Committee is of the view that, as soon as possible, an offender should know his/her release date, supervision period and expiration of any head sentence or continuing detention order.

The Committee is further submits that requirements should be introduced for the State to notify SPA of any application, including any intention for an application. In conjunction with an extended application period, this would allow SPA to be better informed as to the possibility of any applications. The Committee is of the view that specific periods in which SPA is to be notified should be inserted into the legislation and/or regulations.

¹¹ *Crimes (High Risk Offenders) Act 2006* (NSW) ss 6, 13B and 13C.

¹² *Crimes (High Risk Offenders) Act 2006* (NSW) ss 10A, 10B, 18A and 18B.

Question 3.13: The definition of “serious offender”

Should any change be made to the current definition of “serious offender”?

Yes.

The definition of “serious offender” should be amended to incorporate the definition of “high risk offender” under the HRO Act. The Committee is also of the view that SORC should be made responsible for recommending applications under the HRO Act. There are a number of benefits to this approach.

First, it would facilitate a more effective assessment of the prisoner’s likelihood to commit a further relevant offence as required under the HRO Act.¹³ Presently under the HRO Act, courts are to have regard to a number of factors as well as reports and other material that is obtained in support of an application.¹⁴ However, if SORC was responsible for the assessment and recommendation of possible high-risk offenders, it could perhaps provide a more detailed analysis of the progress or lack of progress of the offender. This is in comparison to testing, reports and information gathered only when an application is to be made by the Attorney General towards the end of the prisoner’s sentence.

It is to be noted that offenders be serving a lengthy sentence would enable SORC to gather and compare information and reports over a significant period of time. The Committee is of the view that this would also assist courts in determining an application.

Second, SORC could also notify and consult with SPA regarding any applications under the HRO Act, as it currently does for serious offenders.

However, the incorporation of the definition of “high risk offender” into the definition of “serious offender” should not result in a lowering of the threshold in which applications can be made under the HRO Act. The Committee is of the view that, due to the serious consequences that can flow from an application, they should only be used for the most serious of offences. The combined definition should be drafted in a way that ensures the threshold for making an application is not lowered.

Question 3.14: Parole in exceptional circumstances

Are there any issues with SPA’s power to grant parole in exceptional circumstances?

No.

Question 3.15: Offender involvement and input into SPA decisions

1. Should there be more scope for offender input and submissions to SPA at the first stage of the decision making process (ie the private meeting where a decision is taken or an initial intention formed)?

Yes.

2. Should any change be made to the availability of public review hearings after a decision is made to refuse parole?

The Committee does not believe that any changes are necessary.

¹³*Crimes (High Risk Offenders) Act 2006* (NSW) ss 6 and 14.

¹⁴*Crimes (High Risk Offenders) Act 2006* (NSW) ss 9 and 7.

3. Is there currently significant assistance available to help offenders make meaningful applications for and submissions to review hearings, and to help offenders understand what happens at review hearings?

An offender should be provided with advice as to which conduct they may take in order to increase their chances in eligibility of parole at the earliest opportunity. The Committee believes that the viability of providing an in-custody advisor to provide this information for offenders should be looked into.

4. Are there any problems with offenders not being provided with the material which supports SPA's decisions?

Yes.

This process should be as transparent as possible. The Committee does not see any problem with providing offenders with material which supports the SPA's decisions during private meetings, except where the identities of third parties who have provided adverse information against an offender are involved and/or where such a person's safety is potentially compromised.

Question 3.16: Reasons for SPA's decisions

Should any changes be made to the manner or extent to which SPA provides reasons for its decisions?

Yes.

In order to fully promote transparency and procedural fairness, SPA should be required to provide the applicant with reasons for its decisions as a matter of law unless good reasons exist for not doing so. This would engender increased confidence in the process for offenders, victims and the community. Moreover, there is nothing to support the conclusion that the provision of reasons would fetter any of the discretion currently exercised by SPA.

It is also suggested that decisions of SPA, especially in those in which parole is granted, be available to the general public through publication online. This might serve to partially ameliorate public concerns about the release of certain offenders by apprising the public of the considerations and processes which led to SPA's decision, therefore promoting community understanding, which is especially important in cases that generate significant public interest. Also, as noted in the Committee's Preliminary Submission, the further benefit is that the publication of reasons would assist all parties involved in addressing SPA at public review hearings.

The Committee notes the concerns in relation to the increased burden of providing reasons, potentially leading to increased delays in processing cases. As a pragmatic solution, the Committee recognises that parole decisions regarding offenders serving sentences for very serious offences and/or offenders attracting media attention are most in need of SPA's reasons being published. The Committee therefore suggests that offenders serving an offence/s carrying a statutory maximum of 25 years or more must have their parole decision published, and that for offenders serving offences with lesser statutory maximums it be discretionary and will factor, inter alia, the amount of media interest in the case.

Question 3.17: Appeal and judicial review of SPA's decisions

Should there be any changes to the mechanisms for appeal or judicial review of SPA's decisions, including the statutory avenue in s 155-156 of the CAS Act?

Yes.

Given that the statutory right of review under s 155-156 can only be exercised if it can be shown that the material relied upon by the SPA was false, misleading or irrelevant, this right of appeal can rarely be relied upon by an applicant. Moreover, there is nothing to suggest that this statutory avenue provides any practical utility that would not be covered by the right to judicial review that exists under the common law and s 69 of the *Supreme Court Act*. As a result, s 155-156 of the CAS Act should be repealed.

The common law right to judicial review by the Supreme Court provides a mechanism to uphold the accountability for the decisions of SPA and the recommendations of the SORC. There are no reasons to alter the existence of judicial review in these areas.

Question 3.18: Reconsideration after refusal of parole

1. Should the 12 months rule (as it applies to applications for parole after parole refusal) be changed in any way? If so, how?

Yes.

Acknowledging the concerns that the rule might have the effect of offenders serving shorter sentences having only one attempt at getting parole, the 12 months rule should only apply to sentences with a non-parole period of 3 years or more.

Sentences with a non-parole period of less than 3 years should attract the same rule (i.e. unless necessary to avoid “manifest injustice”), but with a 6 month limitation period.

2. Are there any issues with the requirement to apply for parole reconsideration or the assistance that offenders receive to apply?

Yes.

The Committee notes the Prisoners Legal Service and Aboriginal Legal Service’s difficulties in providing assistance with these applications and that therefore a large number of offenders are not able to prepare persuasive applications. The Committee submits that the pre-2005 position of automatic reconsideration is preferable, although understands the desire to reduce SPA’s workload. Perhaps a “change in circumstances test” might be an effective way for SPA to determine whether an offender’s parole ought be reconsidered, so long as applications are made available to offenders at the 12 month mark that are simple to understand and easy to complete.

Question 3.19: The Drug Court as a parole decision maker

Are there any issues with the Drug Court’s operation as a parole decision maker?

The Committee is not aware of any.

The Committee thanks you for the opportunity to comment.

If you have any questions in relation to the matters raised in this submission, please contact:

Greg Johnson, President of NSW Young Lawyers (president@younglawyers.com.au).

OR

Alexander Edwards, Chair of the NSW Young Lawyers Criminal Law Committee (crimlaw.chair@younglawyers.com.au)

Yours faithfully,



Alexander Edwards | Chair, Criminal Law Committee
NSW Young Lawyers | The Law Society of New South Wales
E: Alexander.Edwards@younglawyers.com.au | W: www.younglawyers.com.au